IN THE MATTER OF THE ARBITRATION BETWEEN

THE BEMIDJI EDUCATION ASSOCIATION, Union, and INDEPENDENT SCHOOL DISTRICT NO. 31 (BEMIDJI), Employer.	)	MINNESOTA BUREAU OF MEDIATION SERVICES CASE NO. 06-PA-1283 DECISION AND AWARD OF ARBITRATOR

APPEARANCES

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On November 9, 2006, and on December 19, 2006, in Bemidji, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. By agreement, the parties extended the hearing to allow presentation of the testimony of another witness by telephone conference on December 22, 2006.

The grievance alleges that the Employer violated the labor agreement between the parties by issuing a letter of reprimand to the grievant, Michelle M. Dahlby. In addition, the grievance alleges that the Employer violated the labor agreement by involuntarily transferring the grievant from the teaching assignment she previously held to a new assignment in a different school building. The parties presented post-hearing briefs and other written argument to the Arbitrator, the last of which was received on February 7, 2007.

FACTS

The Employer operates the public schools in Bemidji, Minnesota. The Union is the collective bargaining representative of the Teachers who teach in the Employer's schools.

The grievant is licensed as an elementary school Teacher, and she has taught as such for thirteen years. For ten years, from 1996-97 till 2005-06, she taught fifth grade at the Solway Elementary School ("Solway"). During the current year, 2006-07, she teaches third grade at the Northern Elementary School ("Northern"). Solway, with about 170 students, is the smallest of the six elementary schools operated by the Employer, and Northern, with about 525 students, is the largest. Solway is what the parties refer to as a "one-section" school, i.e., there is only one classroom with one Teacher for each of its six levels -- kindergarten through fifth grade.

On April 10, 2006, Jordan D. Hickman, the Employer's Director of Human Resources, issued a letter of reprimand to the

grievant. The reprimand is based primarily upon the grievant's alleged failure to cooperate with the efforts made by Stephen O. Johnson, a special education Teacher, to deliver special education services to a student in the grievant's fifth grade class during part of the 2005-06 school year. (Below, in my discussion of the evidence, to provide him anonymity, I refer to the student by the fictitious name, "John Smith.") The letter also makes several allegations that the grievant failed to cooperate with other staff and displayed inappropriate behavior to co-workers. I refer to these allegations as the "additional concerns" noted in the following excerpt from the letter of reprimand:

> Additional concerns were identified during the investigation regarding a general lack of cooperation with other staff and other inappropriate behavior toward co-workers. Specifically, it was indicated that you have questioned the qualifications of other teachers in front of students, resulting in students questioning whether or not that teacher was a "real teacher." Other witnesses expressed sympathy for any new staff and wanted to know what could be done to ensure that EBD teachers and paraprofessionals were not "victimized" by you.

Hickman's letter of April 10, 2006, includes the following paragraph, in which he notified the grievant of the action taken by the Employer:

> Based on information obtained during the investigation and in accordance with [the Employer's policy] SBR 200-70-1 - Employee Discipline, this letter is being issued as a formal letter of reprimand. Furthermore, this letter constitutes notice, in accordance with Article XI, Section 2, of the BEA master agreement, that it has been determined that a transfer is in the best interest of the staff member and the district. You will be notified in writing regarding your transfer assignment for the 2006-07 school year by the last day of school.

On May 8, 2006, the Union brought the grievance now before me. It challenges the issuance of the letter of reprimand and the involuntary transfer of the grievant.

Article V, Section 4, of the parties' labor agreement establishes the conditions upon which a Teacher may be disciplined, thus:

> Section 4. Teacher Reprimand and Discipline
> Subd. 1. Proper Cause
> No teacher shall be denied scheduled salary increase or deprived of any professional advantage without proper cause and due notice.
> Subd. 2. Representation
> No formal disciplinary action shall be taken against a teacher without proper cause and no material shall be placed in a teacher's personnel file as a result of disciplinary proceedings without the teacher first being afforded the opportunity to be represented by the exclusive representative. The teacher may waive such representation.
> Subd. 3. Information
> All information forming the basis for disciplinary action shall be made available in writing to the teacher.

The Employer has adopted an "Employee Discipline Policy," which, except for its preamble, is set out below:

> District 31 employs over 800 licensed and nonlicensed staff. Although most perform their jobs well, there are times when individuals engage in inappropriate behavior. The intent of the School District's disciplinary procedure is to correct the inappropriate behavior in a manner which assures due process to all employees. Under normal circumstances the process is progressive in nature. However, the disciplinary procedure may begin at any step up to and including discharge in appropriate situations.
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> Informal Discussion - (Conference Report)
>
> In general, most disciplinary actions will be [preceded] by one or more informal discussions in an effort to solve the problem. This can be done by conducting informal meetings with the employee in an informal setting. These

meetings are not documented in writing and nothing is placed in the employee's personnel file.

If the informal meeting does not work, a letter should be sent asking the employee to attend a meeting. At this meeting, the supervisor will discuss the concerns with the [employee] and will send a letter to the employee summarizing the meeting. The employee has a right to have a representative at this meeting. Neither the letter requesting the meeting nor the letter summarizing the meeting is placed in the employee's personnel file. However, they can be used as supporting data if inappropriate behavior continues and formal discipline is commenced. The letter summarizing the meeting should include a statement that the employee could be subject to formal discipline if the inappropriate behavior continues.

Although it is hoped that most problems can be corrected through these informal discussions, the School District reserves the right to move directly to the formal discipline at anytime, depending on the seriousness of the behavior.

Formal Discussion

Normally the formal disciplinary process is progressive in nature. The first two steps are nonpunitive and are [directed] solely at correcting the inappropriate behavior. The next two steps are also intended to correct the behavior, but they also include sanctions for the behavior. The disciplinary procedure may begin at any step up to and including discharge depending upon the severity of the situation.

Step 1. Warning

In Step 1, there is a formal conference with the supervisor outlining the nature of the problem, how it relates to the job description of the employee, short term goals for improvement, time lines for future meetings, if applicable. If an employee continues to act in an inappropriate manner following informal discussions or if the employee commits an act believed to be more serious in nature than those that warrant only an informal discussion, a written warning will be issued. There is a formal conference with the supervisor, and time lines, if any. A letter is written signed by both parties and a copy is placed in the employee's personnel file. Should the employee refuse to sign, this fact should be noted on the letter.

Step 2. Reprimand

Step 2 results in a formal letter of reprimand. This step contains a summary of what happened in Step 1, with

emphasis on the job description, the nature of the problem, goals for improvement and time lines for future meetings. Again, the letter would become part of the employee's personnel file.

Step 3. Suspension

At this step an employee is suspended without pay for some period of time appropriate for the situation. At this step an emphasis should be made regarding the concerns of the supervisor, goals for improvement and time lines for future meetings, if any. Every effort would be made to help the employee meet his/her stated goals. Again, a letter would be placed in the personnel file of the employee.

Step 4. Termination

Step 4 would result in termination of the employee after a due process hearing. Veterans have a right to an additional hearing prior to termination if requested. (Nonlicensed staff only.)

Note: Employees who are subjected to employee discipline have a right to attach their account of the matter at all levels of discipline. The superintendent has the discretion to remove letters from the employee's personnel file when such action, in the superintendent's judgment, would further the interests of the school district. The superintendent's action is not considered precedent setting.

Article XI, Section 2, of the parties' labor agreement establishes a procedure for the involuntary transfer of a Teacher from one assignment to another, thus:

Section 2. Teacher Transfers
Subd. 1.
There are situations where an involuntary transfer is in the best interest of the staff members as well as the district. The involuntary transfer procedure will be as follows:

(a) The superintendent or designee, after consultation with the principal, will send a letter to the staff member outlining the reasons why a transfer is suggested.
(b) A meeting will be held where the principal and/or superintendent will consult with the staff member. The staff member will have a fellow teacher present unless he/she waives that right in writing.
(c) A decision will be made by the superintendent after hearing all the facts.

> Subd. 2.
> In general, involuntary transfers will be decided by the last day of school as indicated by the adopted school calendar for the coming year. Unless it is a critical situation, involuntary transfers will not take place during the middle of the year. Effort will be made to help the staff member succeed in the new position. . . .

By law, a student receiving special education service is to receive the kind of service specified in his or her Individual Education Plan ("IEP") by an IEP Team of skilled and interested participants who may include the student's teachers and parents. The IEP that was effective for Smith at the start of the 2005-06 school year was issued by his IEP Team on May 11, 2005. It specified that from May 23, 2005, through May 11, 2006, he should receive service for an emotional and behavioral disability ("EBD") for thirty minutes per school day and, in addition, service for a learning disability ("LD") for ten minutes per month. The IEP required that the EBD service be provided to Smith in the EBD classroom and that the LD service be provided in the LD resource room. The parties refer to special education service that is provided outside of the student's regular classroom as "pull-out" service and to service provided in the regular classroom as "inclusion" service.

During 2005-06, Johnson was the designated EBD Teacher at Solway; he did not provide LD service. His assignment for the year required that he provide EBD service at two schools -- a half-time assignment at Solway and a half-time assignment at Central Elementary School ("Central"). He spent his mornings at Central and arrived at Solway at 12:10 p.m.

From September of 2005, at the start of the 2005-06 school year, until February, 2006, Smith received some EBD

service, but not what was prescribed by his IEP. The primary impetus to the grievant's letter of reprimand -- Step 2 in the formal discipline progression established by the Employer's discipline policy -- was a determination made by Hickman and other administrators that the grievant was largely the cause of the failure to provide full EBD service to Smith. Johnson was not formally disciplined, but he was required to participate in a pre-disciplinary informal discussion, described in the first part of the Employer's discipline policy.

Below, I summarize the testimony of Johnson and the grievant with respect to the provision of EBD service to Smith from September, 2005, till February, 2006. Johnson testified as follows. Sometime during the first two weeks of the school year, he approached the grievant and asked her what would be a good time to take Smith out of her classroom for EBD service. The grievant said he could take Smith during the period the parties refer to as the "allied arts" period -- a time at the end of the school day when students receive instruction in music and art from Teachers who specialize in those subjects. Johnson testified that he was "taken aback" by the grievant's response. He testified that he thought Smith should attend allied arts because special education students generally excel in those subjects.

Johnson testified that some weeks later he asked the grievant if he could come into the regular classroom and deliver EBD service to Smith there, i.e., as inclusion service instead of pull-out service. He testified that the grievant refused,

that he was "taken aback" by the refusal and that he interpreted her attitude as "not negotiable." He thought, however, that the grievant did a good job in maintaining behavior in the classroom and, for that reason, he did nothing to resolve the conflict between them. Johnson testified that he was at fault for not taking steps to be sure that Smith's IEP was followed -- that, though the IEP said that Smith was successful in the regular classroom, it specified that he receive thirty minutes per day of pull-out EBD service.

Johnson testified that about twice a week he went into the classroom and delivered Smith's EBD service as inclusion service during allied arts, but he did not take Smith from the classroom for pull-out service during allied arts. During those twice-a-week visits during the allied arts period, he also provided service to another student. Johnson also testified that about once a week he took special education students to the basketball court to build his rapport with them.

Johnson described possible steps he could have taken to resolve the problem. He could have begun the process for changing Smith's IEP, asking for a new meeting of his IEP team, so that the IEP would permit EBD service to be delivered in the regular classroom, or he could have asked the school principal or other administrators to resolve the problem. He did not do so, however, and, except for the twice-a-week inclusion service during allied arts and once-a-week visits to the basketball court, Smith was not provided with EBD service until late February of 2006.

On cross-examination, Johnson conceded that he was responsible for seeing that the IEP was followed and not the grievant.

The following is a summary of the grievant's testimony about the delivery of EBD service to Smith. Generally, when scheduling service for special education students, she follows the direction of the special education Teacher, but she makes suggestions. She has no authority to supervise special education Teachers. At Solway, at the end of each school year, she met with the fourth grade classroom Teacher, Roben Beyer, to learn about special education students who would be advancing into her fifth grade class the following year. She had seen a document containing a one paragraph summary of Smith's case in September of 2005, before the start of the 2005-06 school year -- though she did not remember having received that when questions first arose about EBD service to Smith in February, 2006. The full IEP was kept in what the parties refer to as the "cum" file. She had found Smith's 2004-05 IEP there the previous summer, but did not look there for the 2005-06 IEP.

The grievant testified that she could not recall the conversation that Johnson described in his testimony -- that, when he asked her at the start of the year when he should take Smith for EBD service, she responded that it should be during allied arts. She testified, however, that she probably did suggest allied arts because it is her usual practice to suggest pull-out services during allied arts, though she also suggests other times such as the period scheduled for reading. The

grievant denied that she ever told Johnson that he could not take Smith from her classroom. She testified that in 2005-06 other special education Teachers pulled out students from her classroom during "core instruction," though her preference is to have them pulled out during allied arts because she wants them to get their core instruction. She also testified that she did not know Johnson was not providing full pull-out service to Smith; she thought he could have been doing so during allied arts, as she had suggested.

The grievant testified that, in late October or early November, Johnson suggested that Smith receive inclusion service in her classroom and that she told Johnson that she thought Smith needed pull-out service to get adequate help. She denied that she was refusing to permit inclusion service, as Johnson testified. She thought Johnson was suggesting inclusion service as an alternative to the pull-out service that Smith's IEP required. She testified that, because his IEP specified pull-out service, a change to inclusion service would have required a change in the IEP, a process that Johnson would initiate.

The grievant testified that on February 22 or 23, 2006, she and Johnson met and agreed that Smith would thenceforth receive pull-out service daily during reading, which started at 1:35 p.m. At that time, she also suggested using the allied arts period for the pull-out service.

William D. Burwell has had a split assignment for four years as the Principal at two schools -- Solway and Horace May

Elementary School. He was the first administrator to investigate the matter of insufficient EBD service to Smith. The notes that Burwell took during his investigation were presented in evidence. The following is a summary of his testimony, as supplemented by those notes. On February 3, 2006, he learned that Smith had been acting out some emotional behaviors. His notes show that he talked to the Chair for Special Education at Solway, Eileen P. Spilman, that she told Burwell that Smith "was receiving a fraction of the services indicated on the IEP," that Burwell asked Spilman why, and that she told him that "the classroom teacher has refused to release the student from her classroom."

On Monday, February 6, 2006, Burwell spoke with Johnson about Smith's service. Burwell's notes about that discussion show the following:

> I asked Mr. Johnson if the student was receiving the services the IEP called for? He answered "no." I asked Mr. Johnson why the student was not receiving the services as called for by the IEP. He answered, "The student's classroom teacher, Mrs. Dahlby, would not allow the student to leave her classroom." Steve added, "I asked her if we could do inclusion in the classroom, and she refused to have the student served in or out of the classroom." . . .
>
> *(Author's note) Mrs. Dahlby refused to allow this student's IEP service to be delivered in the classroom or in a pull-out setting.
>
> *(Author's note) Mr. Johnson was given access to this student for a period of time on Thursdays, and he was slated only to be taken out of specialist classes such as music, art, etc.

Burwell testified that Johnson told him that the grievant would not permit him to take Smith out of the classroom till

allied arts and that he, Johnson, could not provide the service at that time of the day.

Burwell also testified that the practice in the District had once been not to pull special education students out during allied arts. That practice had changed, however, about two to three years before 2005-06, when the District's elementary school principals met and decided to "reach a balance" -- to have students taken out during allied arts some days of the week and to have them taken out during core instruction on other days.

Burwell testified that Johnson apologized for the failure to deliver service to Smith, saying that he should have taken steps to rectify the problem.

Hickman's notes for February 3, 2006, show the following:

> Mr. Burwell contacted me by telephone to report an issue with Michelle Dahlby, Teacher - Solway Elementary. He indicated that [Smith] student, was on an IEP for 30 minutes of special education service every day. He told me that he had spoken to Steve Johnson, Teacher - EBD, who indicated that Ms. Dahlby was not allowing [Smith] to leave her classroom for EBD services.

Later on February 3, 2006, Hickman met with Burwell and Robert G. Vaadeland, Assistant Superintendent and Director of Special Education, to discuss the matter. Hickman's notes about that meeting state, "Mr. Burwell indicated that he has been told that Ms. Dahlby is only allowing [Smith] out of the classroom for EBD services on Thursdays."

Hickman spoke with Spilman on February 6, 2006. Hickman's notes show the following:

> . . . Ms. Spilman then spoke to Steve Johnson and found out that [Smith] was only seeing him for 30 minutes one

> day each week. (Ms. Spilman also reported that she had witnessed Ms. Dahlby yelling at her class that day for being late in returning from chorus.) Mr. Johnson told her that Ms. Dahlby would not release students from her classroom for EBD services. There are two students in Ms. Dahlby's classroom with EBD services on their IEPs. Ms. Spilman indicated that it does not appear that Ms. Dahlby has problems releasing students from her classroom for LD or Speech services. . . .
>
> Hickman met with Johnson and Burwell on February 6, 2006.

Parts of Hickman's notes about that meeting are set out below:

> . . . Mr. Johnson explained that he had approached Ms. Dahlby about identifying time for pull-outs at the beginning of the school year and she indicated that she did not want pull-outs and suggested that he provide service during the last hour of the day when students were scheduled for allied arts. Mr. Johnson indicated that he made a second attempt and talked to Ms. Dahlby about providing service through [an] inclusion model that would not pull the students out of the classroom. This option was also apparently rejected by Ms. Dahlby. Mr. Johnson said that he was providing approximately 90 minutes of service for [Smith] each week and sees him as needed for behavior flare-ups. "Michelle just didn't want to have kids pulled out for services and did not want an inclusion model." . .
>
> [Johnson] stated that he has had no problems with service time for students in other classrooms. Right now there is no established EBD time for [Smith] on Monday, Tuesday, Wednesday, or Friday. [Smith] is receiving EBD service only on Thursdays. This is a new issue with Ms. Dahlby this year, but, it is the first year that Mr. Johnson has worked at Solway Elementary (Denise Magoon provided EBD service at Solway Elementary last year).
>
> Spilman testified as follows. In addition to being

Special Education Chair at Solway, she is a special education Teacher specializing in speech therapy. As she informed Hickman, it was Johnson who told her that the grievant would not permit Smith to be taken from her classroom. Spilman prefers to have pull-outs made from the regular classroom during the teaching of core subjects and not from allied arts when specialists teach music and art -- because special education

students like allied arts and because the regular classroom Teacher has time to make up the missed instruction in core subjects. Spilman testified that she has had special education students in the grievant's class and that she has never had a problem getting her permission for pull-outs.

On February 17, 2006, a meeting was held in Hickman's office to discuss possible discipline of the grievant. The meeting was attended by Hickman and Burwell, representing the Employer, and by the grievant and her representatives, Pamela J. Roiger, Chair of the Union's Rights Committee, and Russell Riley, a Field Representative for Education Minnesota. The grievant's answers to Hickman's questions about Smith's IEP and about her meetings with Johnson were indefinite, showing as she testified, a poor recollection of the relevant events. She was aware on February 10, 2006, that a question had arisen regarding the delivery of service to an unknown student in her class. She looked at the IEPs of all her special education students on Saturday, February 11. She did not find out who the student was until Monday, February 13, 2006, when Johnson came to her and denied that he had started the investigation process, saying that he was under investigation as well. Hickman's notes show that she recalled meeting with Johnson about Smith on October 19th and "at least twice in December."

Hickman raised other allegations relating to the grievant's performance during the meeting of February 17, 2006, which eventually were included as reasons for her reprimand in the disciplinary letter of April 10, 2006. Burwell testified that he intended to discuss those subjects with the grievant in

a meeting with her on January 31, 2006, but that, when issues arose concerning the delivery of Smith's EBD service, that conference was not held.*

Burwell testified as follows about the other concerns he had relating to the grievant's performance. He testified that it was appropriate that the grievant receive a formal reprimand and be transferred involuntarily, while Johnson was required only to attend a pre-disciplinary conference. Johnson apologized and admitted his fault in the matter, while the grievant did not. The grievant was the primary cause, though not the sole cause, of a clash of personalities among staff at Solway. Over the last several years, Burwell received reports that the grievant had criticized other Teachers to students. Staff complained that she was intimidating, that she was not a "team player," that she was possessive of "her kids," that she tried to exempt them from some school activities, that she did not cooperate with a school positive awards program, that she questioned new ideas that new Teachers brought to the school, that she has a strong, dominant personality with which some staff are not comfortable and that, since her transfer to Northern, other Teachers have come forward to offer creative ideas that the grievant's dominance suppressed. Burwell testified that he would not like to see the grievant return to Solway.

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* This testimony seems to be in conflict with Burwell's notes, which, as I have described above, show that the date he first became aware of the non-delivery of Smith's service was February 3, 2006, but I assume that an error in recollection caused the discrepancy.

Burwell asked the grievant to attend a meeting on February 21, 2006. The grievant refused to attend because no Union representative was available to accompany her. It was Burwell's intention to discuss with the grievant and Johnson the delivery of Smith's EBD service. The grievant was not aware that that was the intended purpose of the meeting and assumed that it was another meeting relating to her discipline. As noted above, the grievant and Johnson met on February 22 or 23, 2006, and agreed that Smith would receive daily pull-out EBD service during instruction in reading.

On February 24, 2006, Burwell received an e-mail from Johnson in which Johnson informed Burwell that he and the grievant had met and "worked out" a schedule for Smith's EBD service. Burwell forwarded Johnson's e-mail to Hickman, Vaadeland and to James A. Hess, Superintendent of Schools, with the following message written by Burwell:

> I received this e-mail after I directed [Steve] to follow our (Jordan and Bill) directive of [Steve] making the schedule without Michelle's input as she was insubordinate in not attending the meeting set for [Steve] and her and I to do the scheduling. When I received this e-mail from [Steve], I called him and asked him if this is a mistake and did he do the schedule and give a copy to Michelle or did he and Michelle do the schedule together. I asked him why he did not do the schedule as directed and he said he forgot and that he had, "Screwed up again."

Hickman testified that the transfer of the grievant was not intended to be disciplinary. He also testified that, when he wrote the letter of reprimand of April 10, 2006, he intended to state that the decision to transfer the grievant would be made in the future by Hess, but that he drafted the letter

poorly when he used the following language to inform the grievant of the transfer:

> . . . Furthermore, this letter constitutes notice, in accordance with Article XI, Section 2, of the BEA master agreement, that it has been determined that a transfer is in the best interest of the staff member and the district. You will be notified in writing regarding your transfer assignment for the 2006-07 school year by the last day of school.

On April 28, 2006, Hickman sent the grievant the following letter relating to the transfer:

> Article XI, Section 2, of the current collective bargaining agreement between [the Union and the Employer] provides for involuntary transfers when it is determined to be "in the best interest of staff members as well as the district."
>
> It has been determined that a transfer from [Solway to Northern] effective for the 2006-07 school year is warranted. The transfer is being suggested due to concerns outlined in a letter dated April 10, 2006. The transfer will create an opportunity to re-establish professional working relationships at a new building.
>
> In accordance with the "teacher transfers" provision of the current collective bargaining agreement, a meeting has been scheduled with Bill Burwell, Principal - Solway Elementary, on Friday, May 5, 2006, at 2:45 p.m. to discuss the suggested transfer. You may have a fellow teacher present during the meeting. You may also provide a written waiver of the right to have a fellow teacher present. A final decision will be made by the Superintendent following this meeting.

On May 4, 2006, Roiger sent Hess a letter objecting to the process being used to transfer the grievant on several grounds, one of which was that the decision to transfer had been made without consultation with the grievant as required by Article XI, Section 2, Subd. 1(b), of the labor agreement. Hickman responded to Roiger's letter on May 5, 2006, stating that after the meeting between the grievant and Burwell, "the

Superintendent will review all relevant information and make a decision."

The proposed May 5, 2006, meeting between Burwell and the grievant at which her transfer was to be discussed was postponed till May 9, 2006. The grievant, Roiger, Burwell and Hickman were present at that meeting.

Hickman's notes about the meeting were presented in evidence. Though the speakers are not clearly identified in the notes, I interpret them in the following summary. Roiger said that the decision to transfer the grievant was based on faulty and inaccurate information. The grievant said that she had completed her responsibility with respect to Smith's EBD service and that Johnson, as case manager, was responsible for making sure that the services were being delivered in accord with the IEP. Burwell or Hickman said that the grievant had a dual responsibility with Johnson to be sure that the IEP was being followed. The grievant said that she assumed that the IEP was being followed, that Johnson had so informed her. She said that, when Johnson proposed inclusion services, her response was in compliance with the IEP, which required pull-out services and would have to be changed if he wanted inclusion services.

There was further discussion about the furnishing of the schedule of special education Teachers to the classroom Teacher and about whether Johnson gave the grievant his schedule in a timely manner. The notes end with a description of the service Smith was then receiving after the grievant and Johnson met on February 22 or 23, 2006, and agreed to have daily pull-out

service during instruction in reading. The notes show no discussion of the personality conflicts at Solway that were listed in the letter of reprimand of April 10, 2006.

Hickman testified that the grievant said during the meeting that Johnson had failed in his responsibility by not delivering Smith's service during allied arts, as she had proposed. He also testified that the grievant said she did not want to leave Solway, that she had a long history there and that she had a lot invested in its students.

On May 23, 2006, because the grievant requested a further meeting without the presence of Burwell, Hickman met with her and Roiger. The grievant said that Burwell was targeting her and had been doing so for three years. She said that she has asked special education Teachers every year whether special education students can be pulled out during allied arts. She said that she has ties to the community at Solway and described some of the extra effort she makes in behalf of the school and its students. Hickman testified that the grievant said that her transfer from Solway would be punitive.

Hickman testified that on June 1, 2006, he met with Hess and told him about the meeting of May 23, 2006. Hickman testified that he had documentation from Burwell before January 31, 2006, relating to staff complaints described in his letter of reprimand of April 10, 2006, and that he had reviewed those documents with Burwell and Hess before he wrote the letter.

On June 2, 2006, Hess sent the grievant a letter notifying her that she would be transferred to Northern at the

start of the 2006-07 school year and that she should contact the Principal at Northern for her grade assignment. She was assigned to teach third grade.

Hess testified that he made the decision to transfer the grievant, that there had been discussions about the transfer since February, 2006, that he considered the complaints of staff about the grievant and letters in her support from staff and parents who did not want her transferred. He thought that the letter of reprimand was appropriate because she had not been cooperative in the process of scheduling Smith's services and because she had not acknowledged her responsibility in the failure of service, whereas Johnson had done so, thus justifying only a pre-disciplinary conference with him. Hess testified that he did not consider the grievant's reprimand when deciding to transfer her. He considered the fact that there was friction between Burwell and the grievant and that staff at Solway had complained about her.

Roiger testified that during the meeting on May 9, 2006, at which she, the grievant, Burwell and Hickman discussed the grievant's transfer, Hickman said that Hess was in agreement that the grievant should be transferred.

The parties presented a substantial amount of evidence relating to the grievant's merits as a Teacher and to her relationships with the staff at Solway and the parents of students at Solway. Melissa M. Leslie, a Paraprofessional who is the Assistant for second grade, testified that during the 2005-06 school year there was tension and stress among the

staff, that there is now, during the 2006-07, a distribution of leadership among the staff that was not possible last year because the grievant was in control. Leslie acknowledged that she and the grievant "had differences" when the grievant became angry that Leslie was late returning from a special school lunch and was not available to meet with a student the grievant had sent to her. Leslie's complaints about the grievant were given in writing to Burwell in early February, 2006, after he asked her to provide such documentation.

Julia T. Simons, who teaches Media-Technologies at Solway, testified that the grievant did not cooperate on several special projects and that the grievant had resisted returning a book cart Simons had asked for. These complaints were given to Burwell in writing in early February after he asked her to document complaints made to him orally.

The record includes several letters sent to Burwell during 2004 by Dawn Kovacovich, the Media-Technology Teacher at Solway before Simons. These letters state that the grievant had expressed to her students disapproval of a project that Kovacovich had undertaken and that the grievant remarked that Kovacovich was a substitute Teacher who would not be at Solway the following year.

In response to the evidence about the grievant's relations with other staff at Solway, the Union presented evidence that I summarize as follows. The grievant testified that she received the Teacher of the Year award for the School District in 2003-04, after being nominated for that award by a

Teacher at Solway, by several of her students and by parents of her students. This award is conferred by the Union, not by the Employer. That year was Burwell's first year as part-time Principal at Solway. He gave the grievant a good evaluation, praising her teaching and her leadership in several school programs. Burwell testified that, because 2003-04 was his first year at Solway, he had not yet learned about her deficient relations with other staff.

The Union presented in evidence ten letters that the grievant solicited in late May, 2006, for submission to Hess as he considered the grievant's transfer. The letters praise the grievant's contributions to Solway and oppose her transfer. One of the letters is from a parent, Wendy Otness, who also testified at the hearing. The other nine letters are from staff at Solway -- Vonnie Van Dyke, a Title I Teacher, Denise Johnson, a Title I Teacher, Karen Pooley, the first grade Teacher, Ellen Anderson, a second grade Teacher, Tiffany Berg, a second grade Teacher, Barbara Ellingson, the third grade Teacher, Roben Beyer, the fourth grade Teacher, David Jansen, Art Specialist, and Rachel Schindler, Library Paraprofessional.

In addition, the Union presented in evidence a letter, dated June 5, 2006, from Lenore Siems, a part-time Music Teacher at Solway, in which Siems praises the grievant's support. The Union also presented favorable evaluations of the grievant's performance during the early years of her assignment to Solway, prepared by the former Principal at Solway, Ronald Bouchie. In 2003, after the grievant received the Teacher of the Year award, Bouchie, who had retired, wrote her the following letter:

> Congrats Michelle -- It's great to see your hard work gain some recognition. The award is very well deserved -- you should be very proud and pleased. There are few educators who put forth the effort and dedication which you continuously show. I hope you have a great year. I miss working with you and the Solway staff.

The grievant has not been disciplined before she received the letter of reprimand of April 10, 2006.

DECISION

Below I discuss several issues of contract interpretation raised by the parties' arguments, but before doing so, I must decide the primary issue raised by the grievance -- whether the Employer had "proper cause" to issue the letter of reprimand to the grievant.

Article V, Section 4, Subd. 2, of the labor agreement provides that "[n]o formal disciplinary action shall be taken against a teacher without proper cause." I read the standard "proper cause" as the equivalent of the "just cause" standard found in most labor agreements. The Employer's discipline policy establishes a preliminary non-disciplinary step, informal discussion, and four steps of formal progressive discipline -- a warning at the first level, a letter of reprimand at the second level, suspension at the third level and termination at the fourth level.

The letter of reprimand lists as "additional concerns" the grievant's "general lack of cooperation with other staff and other inappropriate behavior toward co-workers," but it is clear that the primary allegation made in support of the reprimand is that she failed to cooperate with Johnson in scheduling EBD services for Smith.

The evidence includes the conclusions of several witnesses that the grievant failed to cooperate with Johnson in scheduling EBD services for Smith -- the conclusions of Hickman, of Burwell and of Spilman. Their conclusions that the grievant failed to cooperate with Johnson, however, are all based on the account that Johnson gave them in February, 2006. The evidence shows that they formed those conclusions by accepting what Johnson told them before hearing the grievant's account, which was first given at the disciplinary meeting of February 17, 2006. Here, the determination whether the grievant failed to cooperate with Johnson must be made by examining the testimony of Johnson and the grievant, the two participants.

Johnson testified that early in the school year, he asked the grievant what would be a good time to take Smith out of the classroom for EBD service, that she said he could take Smith during allied arts, and that he was "taken aback," by her response. Though the grievant had no specific recollection of that conversation, she testified that the response Johnson attributed to her seemed consistent with her usual response to questions about pull-out service. Thus, there is no real conflict in their testimony about the initial scheduling of Smith's EBD service.

Johnson did not testify that their initial conversation included further discussions after the grievant responded that allied arts would be a good time to schedule the service. He testified that he was surprised by the grievant's answer and that he thought special education students should not miss

allied arts. He did not testify that he made any response to the grievant -- to express his preference not to pull out students during allied arts, to express his surprise that the grievant said that allied arts would be a good time for the service, or to ask her to suggest a time other than allied arts. Because the grievant had no specific recollection of the conversation, his account of their conversation is the only testimonial record of what happened, and I accept it. This evidence, however, does not support a finding that the grievant failed to cooperate with Johnson in scheduling a time for Smith's EBD service.

It appears that Johnson and the grievant had a difference of opinion about the kind of education that should not be missed to accommodate pull-out services, but the evidence does not show that the grievant would not have cooperated in finding a time other than allied arts if Johnson had pursued the matter. Indeed, the record shows clearly and without contradiction that other special education students of the grievant received pull-out service during periods other than allied arts, during 2005-06 and during previous years -- thus implying that the grievant's allied-arts response to Johnson was a suggestion and not a refusal of any other schedule. That implication is confirmed by Johnson's testimony about the grievant's response when he asked her what would be a good time for Smith's pull-out.

The evidence shows that in October or November Johnson asked the grievant to schedule inclusion service for Smith, but that she told him that Smith needed pull-out service. Because

that response was consistent with Smith's IEP, it was the appropriate response. Johnson could have initiated the process to change the IEP if he wanted inclusion service. It was not the grievant's duty to do so, though she could have started the process. Because she agreed with the IEP team that the service should be pull-out service, it was not incumbent on her to initiate such a request for change.

With respect to the primary basis for the letter of reprimand -- the grievant's alleged failure to cooperate with Johnson in scheduling Smith's EBD service -- I conclude that the grievant should not have been formally disciplined. Certainly, she was no more responsible for the failure of service than was Johnson. The Employer argues that, because Johnson apologized and recognized his fault in the failure of service whereas the grievant did not, the letter of reprimand was justified. For two reasons, I disagree. First, as I have described above, the grievant had a duty to cooperate with Johnson in scheduling Smith's pull-out service, but the evidence on the subject -- Johnson's testimony -- does not support a finding that she failed to cooperate. Thus, it did not appear to her that she bore the responsibility attributed to her. Second, she was not informed of the specific allegations against her until the disciplinary meeting of February 17, 2006. There, because the setting appeared accusatory, she understandably adopted a defensive stance. Below, as I resolve issues concerning the challenge to the grievant's involuntary transfer, I discuss whether the letter of reprimand was justified by the "additional

concerns" that the letter alleges -- that the grievant showed a general lack of cooperation with staff at Solway.

The evidence does not support a determination that the grievant was a disrupting influence at Solway. The evidence shows that the grievant is an excellent Teacher. Burwell testified that he had no criticism of her classroom performance. She had never been disciplined. Though she had minor differences with a few Teachers, most of the staff opposed her transfer and expressed praise for her. Bouchie, Solway's previous Principal, had good relations with her. The evidence shows that Burwell, the new Principal, disliked her, but it does not show that she was a disrupting influence at Solway. I find that the allegation made in the letter of reprimand that the grievant exhibited a general lack of cooperation with staff is not justified. I conclude that the letter of reprimand is not supported by proper cause.

The Union argues that the Employer transferred the grievant without complying with Article XI, Section 2, Subd. 1, of the labor agreement, which, as I read that provision, requires that the Teacher whose transfer is "suggested" be afforded a meeting and consultation with the principal or superintendent and that a decision about the transfer be made after hearing all the facts, i.e., after such a meeting and consultation.

The Union argues that the letter of reprimand itself states that a final decision to transfer the grievant was made as early as the date of that letter, April 10, 2006, when the

letter informed her that "this letter constitutes notice . . . that it has been determined that a transfer is in the best interest of the staff member and the district" and that "[y]ou will be notified in writing regarding your transfer assignment for the 2006-07 school year by the last day of school."

Hickman's letter of April 28, 2006, states that "it has been determined" to transfer the grievant from Solway to Northern. Though the letter also states that the "transfer is being suggested due to concerns outlined in a letter dated April 10, 2006," the following sentence -- "[t]he transfer will create an opportunity to re-establish professional working relationships at a new building" -- shows that the decision had been finally made. This finding is confirmed by Roiger's testimony that Hickman told her on May 9, 2006, that Hess agreed that the grievant should be transferred.

The effort to comply with the involuntary transfer provisions of the labor agreement, by hearing the grievant after a final decision had been made, cannot satisfy the intent of Article XI, Section 2, Subd. 1 -- that a decision to transfer will not be made until good faith consideration is given to arguments opposing the transfer.

The parties' arguments raise an additional issue -- whether the Employer can transfer a Teacher involuntarily without complying with the requirements of Article XI, Section 2, Subd. 1, if the transfer is made for disciplinary reasons. The Employer urges that the labor agreement should be read to permit such a transfer -- conceding, arguendo, that the

grievant's transfer was disciplinary. This issue is made moot by my decision above that there was not proper cause for the reprimand -- and the putative disciplinary transfer -- made by the letter of April 10, 2006.

Nevertheless, I offer the parties my preliminary thoughts about this issue. The adoption of a process for making involuntary transfers in Article XI, Section 2, Subd. 1, appears to be definitive. It expresses the parties' complete bargain about involuntary transfers, and, in accord with legal maxim, excludes other, possibly implied bargains. The Employee Discipline Policy, because it does not list involuntary transfer as a permitted form of discipline, indicates that the Employer, when adopting the policy, did not consider involuntary transfer to be a permitted form of discipline.

The Union seeks an award requiring the Employer to withdraw the letter of reprimand and to rescind the involuntary transfer of the grievant. The Employer argues that the return of the grievant to Solway in the middle of the school year would be disruptive to staff and students at both Solway and Northern. I am reluctant to order the return of the grievant to Solway in mid-year. Not to do so, however, would provide her and the Union with no remedy for violation of the involuntary transfer requirements of the labor agreement. Accordingly, the award orders her immediate return to her former position.

I suggest, however, the following compromise -- one that is beyond my authority to order, but which may serve the interests of both parties. The parties might agree that, in

consideration of a waiver by the grievant of a return to her position at Solway during this school year, the Employer will return her there next year and not again initiate the process to transfer her involuntarily.

I note that I have not considered the post-hearing materials presented by the parties that relate to a recent arbitration award issued by Arbitrator Christine Ver Ploeg.

AWARD

The grievance is sustained. The Employer shall withdraw the letter of reprimand issued to the grievant on of April 10, 2006, and the Employer shall forthwith return her to her position as fifth grade Teacher at Solway Elementary School.

March 20, 2007

Thomas P. Gallagher, Arbitrator